IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 23 OF 2000.

1. Smt. Shalini Ballikar and her children:
2. Shri Ulhas Dessai.
3. Smt. Mina Dessai.
4. Smt. Sharayu Dessai,
   all majors of age and
   r/at H. No.63, Pariecotto,
   Comba, Cuncolim, Salcete,
   Goa. .... Appellants.

Versus

Smt. Aidem Naique,
resident of House No.83,
Biunsa, Cuncolim,
Salcete, Goa. .... Respondent.

Shri M.B. Da Costa, Senior Advocate with Shri J.A. Lobo, Advocate for the Appellants.

Shri C.A. Coutinho, Advocate for the Respondent.

CORAM: V. M. KANADE, J.

DATE: 11th August, 2005.

J U D G M E N T:

The appellants are the original defendants. The respondent/original plaintiff filed a Suit bearing No.97/86 in the Court of Civil Judge, Junior Division at Margao for a declaration that the marriage of appellant No.1 with late Raiu Shannu Naique solemnized on 11th June, 1981 is null and void and for a consequential direction to the Civil Registrar

of Salcete and Margao to cancel the said marriage registered under No.629 in the Marriage Registration Book of the year 1981 and also for a declaration that the legitimisation of the illegitimate children from this marriage is null and void. The appellants herein/original defendants contested the suit. The trial Court was pleased to dismiss the suit including the counter claim filed by the appellant No.1. Against the said Judgment and Order, the respondent/plaintiff filed an appeal bearing No.73/1998 in the Court of the Addl. District Judge, Margao who by his Judgment and Order dated 1st December, 1999 and Decree dated 13th December, 1999 allowed the appeal and set aside the Judgment and Order passed by the Civil Judge Junior Division Margao. Against the said order, the appellants have preferred this Second Appeal in this Court. The Second Appeal was admitted by this Court on 21st September, 2000 and substantial question of law as formulated in clause (f) of the appeal memo was framed which reads as under :

" Whether the legitimisation of appellants No.2 to 4 could be invalidated when Article 31 of the Law of Marriage No.1 states that even illegitimate children of void or voidable marriage get status of legitimate children, even though such a marriage was not contracted bona fide by one or both the spouses. "

2. The learned counsel appearing on behalf of the appellants invited my attention to Article 31 of Family Laws No.I. Article 31 is included in Chapter IV which deals with the effect of annulment specially with respect to the fate of minor children. Article 31 reads as under :

" However, the children of a void or voidable marriage shall always be legitimate, although they were born before the marriage and even if it has not been contracted bona fide by one or by both of the spouses.

Sole paragraph. However, children of persons included in clause 1 and 2 of Article 4 are excluded, who shall have only the rights referred to in Articles 50 to 52 of Decree No. 2 of this date. "

3. He also invited my attention to the plaint and to the evidence which is brought on record in which the plaintiff herself has admitted that the appellants No.2 to 4 were born out of the marriage between the appellant No.1 and the late husband of the plaintiff. He submitted that though he does not wish to challenge the decree passed in terms of prayer clause (a) of the plaint he submits that the Decree in terms of prayer clause (b) of the plaint is liable to be set aside in view of Article 31 of the Family Laws.

4. The learned counsel appearing on behalf of the respondent vehemently opposed the said submission made by the learned counsel for the appellants. He submitted that there was no reason to interfere with the

finding recorded by the first appellate Court and the question formulated by this Court while admitting the Second Appeal is not a substantial question of law which is a finding of fact. He submitted that it is settled position in law that the High Court cannot re-appreciate the evidence in Second Appeal and set aside the finding of fact recorded by the lower Courts nd substitute the said finding after re-appreciating the evidence.

5. It is an admitted position that the appellant No.1 married the late Raiu Shamu Naique on 11.6.1981. The first appellate Court has given a finding that the plaintiff was the lawfully married wife of the said Raiu Naique as the marriage had taken place in the year 1947 and was duly registered in the Marriage Registration Book. This finding of fact cannot be altered. The short question which falls for consideration is whether after having declared that the marriage of appellant No.1 with the said Raiu on 22.6.1981 is null and void, can a further consequential declaration be made that the children out of the said marriage are also illegitimate ?

6. In my view, such a declaration cannot be given as it would be contrary to Article 31. After perusing Article 31 it can be seen that the children of a void or voidable marriage shall always be legitimate. It further clarifies that such children would be legitimate even if they are born before the marriage and even if it is not contracted bonafide by one or both

the spouses. The only exception being that children of persons included in clauses 1 and 2 of Article 4 are excluded. Article 4 lays down that categories of persons who are having mere blood relations cannot get married with each other. Therefore only such children which are born out of marriages mentioned in Article 4 are excluded from the purview of Art. 31. Admittedly, in the present case appellants No.2 to 4 do not fall in the said category. There is a clear admission in the plaint that the appellants No.2 to 4 were born to appellant No.1 out of the illegal marriage between the late husband of the plaintiff and appellant No.1. This fact has not been denied by the plaintiff in her evidence also. In view of this clear admission given by the plaintiff, in my view, the decree passed by the first appellate court in terms of prayer clause (b) of the plaint is clearly illegal and therefore has to be quashed and set aside. The Decree passed by the District Judge, South Goa, Margao in Regular Civil Appeal No. 73/98 is accordingly modified and the declaration granted by the District Judge, South Goa, Margao that the legitimisation done of the children of defendant No.1, i.e. of defendants No.2, 3 and 4 being declared null and void is set aside and quashed. The rest of the Decree is confirmed. The Second Appeal is allowed in the above terms.

V. M. KANADE, J.

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